Last page of docket
SHOKT PROCEEDINGS AND ORDERS DATE: [11/28/90]

CASE NBR: [90100295] CFX STATUS: [DECIDED]
SHORT TITLE: [Temple, Billy]
VERSUS [Synthes Corp., Ltd.] DATE DOCKETED: [080690]

PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Jul 9 1990	G	Application (A90-24) to extend the time to file a petition for a writ of certiorari from July 10, 1990 to August 9, 1990, submitted to Justice White.
2	Jul 15 1990		Application (A90-24) granted by Justice White extending the time to file until August 9, 1990.
3	Aug 6 1990	G	Petition for writ of certiorari filed.
4	Sep 12 1990		Brief of respondent Synthes Corporation in opposition filed.
5	Sep 19 1990		DISTRIBUTED. October 5, 1990
7	Oct 9 1990		REDISTRIBUTED. October 12, 1990
9	Oct 15 1990		REDISTRIBUTED. October 26, 1990
11	Oct 29 1990		REDISTRIBUTED. November 2, 1990
12	Nov 5 1990		Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam.

****

90-295

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1990

BILLY J. TEMPLE,
Petitioner

V.

SYNTHES, LTD. (U.S.A.)
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALAN R. SACKS
SACKS & EASON
111 Veterans Blvd., Suite 1212
Metairie, Louisiana 70005
P. O. Box 840070
New Orleans, Louisiana 70184-0070
Telephone: (504) 831-4434

Attorney for Petitioner
BILLY J. TEMPLE

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Whether a joint tort-feasor is an indispensable party under the meaning of Rule 19(b) of the Federal Rules of Civil Procedure.

2. Whether Rule 19(b) of the Federal Rules of Civil Procedure requires that the dismissal of a suit for failure to join an indispensable party be without prejudice.

LIST OF PARTIES

The only parties to this action are listed in the caption.[1]

[1] The District Court sitting in and for the Eastern District of Louisiana, dismissed Temple's suit with prejudice for failure to join S. Henry La Rocca, M.D. and St. Charles General Hospital as defendants.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES (continued)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BILLY J. TEMPLE,
Petitioner

V.

SYNTHES, LTD. (U.S.A.)
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Billy J. Temple ("TEMPLE") petitions this Court for a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Federal Circuit which was entered on March 9, 1990.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Federal Circuit is unreported by determination of that Court. See Appendix A, infra, pages A-1 through A-3. The opinion of the United States District Court for the Eastern District of Louisiana is also unpublished. See Appendix E, infra, pages A-11 through A-13.

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[1] A Petition for Rehearing was denied on April 11, 1990.

JURISDICTION

The Court of Appeals entered judgment on March 9, 1990 (Appendix A, infra, page A-1) and denied a Petition for Rehearing on April 11, 1990. (Appendix B, infra, page B-1) This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 19 of the Federal Rules of Civil Procedure states in pertinent part:

"Joinder of persons needed for just adjudication:
a) Persons to be joined if feasible:
A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest. . . If the person has not been so joined, the Court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action."

b) Determination by Court whenever joinder not feasible:
If a person as described in subdivision a) 1 - 2 hereof cannot be made a party, the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the Court include:
. . .[W]hether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder."

Rule 20 states in pertinent part:

"Permissive joinder of parties:
. . .]A]ll persons. . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences. . ."

Federal Rules of Civil Procedure, Rule 14 states in pertinent part:

"Third-Party Practice:
a) When defendant may bring in third party:
At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. . ."

Louisiana Civil Code Article 2324 provides:

"He who causes another person to do an unlawful act, or assist or encourage in the commission of it, is answerable, in solido, with that person, for the damage caused by such act. Persons whose concurring fault has caused injury, death or loss to another are also answerable, in solido; provided, however, when the amount of recovery has been reduced in accordance with the preceeding article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of negligence has been attributed, reserving to all parties their respective rights to indemnity and contribution."

STATEMENT

On October 2, 1986 a "plate and screw device" manufactured by Synthes was implanted by Dr. S. Henry La Rocca into the lower spine of Billy J. Temple at St. Charles General Hospital in New Orleans. Following the implant one or more fixation screws had broken off inside Temple's back.

On September 20, 1987 Temple, a Mississippi resident, filed a diversity damage suit against Synthes, Ltd., a Pennsylvania Corporation, in the United States District Court for the Eastern District of Louisiana alleging defective design and manufacture of the plate and screws.

Temple filed a separate suit in state court against S. Henry La Rocca, M.D. and St. Charles General Hospital based upon alleged inadequacy of a consent form executed prior to the implantation surgery. Synthes is not a party to the state court action, and has not brought a third party complaint against the claimed solidary obligors in the

district court, pursuant to F.R.C.P. 14.

Instead, on April 18, 1989, Synthes Ltd. filed a Motion to Dismiss the plaintiff's suit for Failure to Join Parties Needed for Just Adjudication pursuant to F.R.C.P. 19, on the basis that Temple failed to join potential joint tortfeasors, La Rocca and St. Charles General, who were subject to service of process. The Motion was heard on May 10, 1989 and was granted on July 24, 1989. The District Judge ordered Temple to join additional parties within twenty (20) days or the action would be dismissed with prejudice. On August 15, 1989 a judgment dismissing Temple's claim with prejudice was entered since additional parties were not joined.

Following the dismissal of his suit with prejudice, Temple appealed in order to have his suit re-instated, or to be given leave to proceed against Synthes in state court. The United States Court of Appeals for the Fifth Circuit affirmed the dismissal with prejudice, on the basis that there was no abuse of discretion in the action of the district court under Rule 19.

Temple thereafter petitioned for rehearing of his appeal seeking to modify the dismissal to be without prejudice to refiling in state court. The Fifth Circuit Court of Appeals denied the Petition for Rehearing on April 11, 1990.

REASONS FOR GRANTING THE PETITION

1. Dismissal under F.R.C.P. 19(a) was improper because joint tort-feasors are permissive parties who need not be joined in one action.

This case raises the issue of whether a party's suit

may be dismissed under F.R.C.P. 19(a) for failing to join other parties as defendants whom the sole defendant purports to be joint tort-feasors subject to service of process. The District and Appeals Courts have held that a party's suit is to be dismissed with prejudice where the action may have an effect upon absent parties against whom suit has been instituted in a state court.

The result of this decision is to deprive Billy J. Temple of any remedy whatsoever against Synthes who alone manufactured the screws which broke off while implanted in his back. In affirming the District Court's dismissal with prejudice, the Court of Appeals barred Temple from joining Synthes in the state court action, contrary to Supreme Court, Fifth Circuit and other Circuit authority.

Rule 19(a) of the Federal Rules of Civil Procedure provides when joinder is necessary:

> "a) Persons to be joined if feasible:
>
> A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsisent obligations by reason of the claimed interest. . . If the person has not been so joined, the Court shall order that the person be made a party.

In order to determine whether or not the absent Dr. La Rocca and St. Charles General are to be joined in the instant case is governed by applying the test set forth in Rule 19. The first inquiry to be made is whether in their absence complete relief can be accorded among those already parties.[2]

Under the facts of this case and Louisiana substantive law complete relief may be accorded between the present parties.

Louisiana Civil Code Article 2324 provides in pertinent part that:

> "He who causes another person to do an unlawful act, or assist or encourage in the commission of it, is answerable, in solido, with that person, for the damage caused by such act. Persons whose concurring fault has caused injury, death or loss to another are also answerable, in solido;

Thus, according to Louisiana law, if the concurring fault of Synthes, Dr. La Rocca and St. Charles General caused Temple's injury, Synthes would be liable only in solido as a joint tort-feasor. Temple may therefore elect to proceed against any one of several joint tort-feasors. ". . .

---

2. "While a party should be joined if its presence is deemed necessary for the according of complete relief refers to relief as to the persons already parties, and not as between a party and the absent person whose joinder is sought." 3A *Moore's Federal Practice* Section 19.07.1 (2d ed. 1963); 2 Barron & Holtzoff Federal Practice & Procedure Section 513.8. (Wright Ed. 1961)

[I]t is well recognized that joint tort-feasors are solidarily liable and plaintiff may elect to sue any one of them."[3] Complete relief may therefore be accorded without the addition of the absent parties.

The next inquiry under Rule 19(a) (2) (i) is whether Dr. La Rocca and St. Charles General claim an interest relating to the subject of the action and are so situated that the disposition of the action in their absence may either impair or impede the ability of Dr. La Rocca and St. Charles General to protect that interest. Since Dr. La Rocca and St. Charles General are defendants in a state court proceeding they may adequately protect their interests in that proceeding. Any judgment rendered in this proceeding will have no binding effect upon Dr. La Rocca or St. Charles

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3. *Mullin v. Skains*, 252 La. 1009, 215 So. 2d 643 (1968); *Landry v. State Farm Fire and Casualty Company*, 504 So. 2d 171 (La. App. 3rd Cir. 1987) at p. 175:

> "Although Century/Wel-Bilt Industries, Inc., as successor of Wel-Bilt Products Company, may also be held liable to plaintiff as the actual manufacturer of the defective attic stairway in solido with Sears, plaintiff chose not to join Century. Plaintiff had the unquestioned right to seek judgment only against Sears and a complete adjudication of the controversy vis-a-vis plaintiff and Sears can be made without the joinder of Century. La. C.C. Arts. 2091 and 2094, the substance of which is now found in La. C.C. Arts. 1794 and 1795. Further, our Code of Civil Procedure clearly provides that a solidary obligor may be sued to enforce a solidary obligation, without the necessity of joining all others in the action. La. C.C.P. Arat. 643 and the official revision comments to that article; *Inabinet v. State Farm Automobile Insurance Company*, 262 So. 2d 920 (La. App. 1st Cir. 1972)." *Landry*, supra at 175.

General since they are not parties to this action.

Furthermore, the purpose of Rule 19(a) (2) (i) is to protect an absent person with an interest in a specific fund.[4] Clearly, Dr. La Rocca and St. Charles General have no interest in a specific fund.

Lastly, the test requires that the Court inquire pursuant to Rule 19(a) (2) (i) as to whether in the absence of Dr. La Rocca and St. Charles General the disposition of the action would leave Synthes subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations. Synthes cannot be exposed to multiple or inconsistent obligation, since judgment in this case would bar other judgments against Synthes under the doctrine of *res judicata*.

Since Synthes perceives La Rocca and St. Charles as potential joint tort-feasors subject to service of process, it is incumbent upon them, as a defending party to "cause a Summons and Complaint to be served upon [La Rocca and St. Charles General]. . . persons[s] not a party to the action who [are] or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. . .".[5]

Had this occurred, no doubt La Rocca and St. Charles General would have sought dismissal or stay of the pending state court proceeding, allowing a trial of all issues in one forum.

The lower courts overlooked federal authority by

---

4. *Virginia Electric and Power Company v. Bunko Ramo*, 61 .F.R.D. 366 (E.D.Va. 1973).

5. Federal Rules of Civil Prodedure, Rule 14.

applying .F.R.C.P. 19 instead of F.R.C.P. 20.[6] Several commentators are also in agreement that Rule 19 does not require the joinder of joint tort-feasors.[7]

2. Dismissal of Temple's suit with prejudice bars him from proceeding in another forum, in spite of his right to do so under F.R.C.P. 19(b).

The lower courts did not apply the test required by F.R.C.P. 19(b) as to whether an action should proceed among the parties before it, or be dismissed. Without relying upon proper guidelines, the lower courts spontaneously concluded that La Rocca and St. Charles General were indispensable parties. These considerations are set forth in the text of the rule itself:

6. Simply stated, "it is well established that Rule 19 does not require the joinder of joint tort-feasors". *Nuttingham v. General American Communications Corporation*, 811 F.2d 873, 880 (5th Cir. 1987). See also *Herpich v. Wallace*, 430 F.2d 792, 817 (5th Cir. 1980). The notes of the advisory committe commenting on Rule 19 reflect the fact that Rule 19 does not apply to the joinder of joint tort-feasors. ". . . [A] tort-feasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability. . . .Joinder of these tort-feasors continues to be regulated by Rule 20. . .". Rule 19, Notes of Advisory Committee, 39 F.R.D. 89, 91 (1966).

7. "Under generally acceptable principals of tort law, the liability of joint tort-feasors is both joint and several. The 1966 amendment of Rule 19 does not alter the long-standing practice of not requiring the addition of joint tort-feasors. Thus, plaintiff may sue one or more of them without joining the others". Wright, Miller and Kane, *Federal Practice and Procedure:* Civil 2d Section 1623.

"Tort-feasors are neither indispensable nor necessary since their liability is both joint and several." 3A *Moore's Federal Practice* Section 19.07-11. For an interesting discussion of the issues confronting this Court, see *Atlantic Aero, Inc. v. Cessna Aircraft Company*, 93 F.R.D. 333 (M.D.N.C. 1981) wherein the Court refused to dismiss an action due to failure of the plaintiff to join a joint tort-feasor.

"b) Determination by Court whenever joinder not feasible:

If a person as described in subdivision a) 1 - 2 hereof cannot be made a party the Court should determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the Court include: . . . [w]hether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder."

The Supreme Court has previously construed the interests to be considered in applying F.R.C.P. 19(b):

"First the plaintiff has an interest in having a forum. . ."[8]

"[T]he Court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible." (citations omitted)[9]

The lower courts have erred in this case for failing to consider the interests involved, as the Fifth Circuit had done previously in *Ferguson v. Thomas*, 430 F.2d 852, 860 (5th Cir. 1970):

"The Court must. . . [give] consideration to four factors: first, the extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which by protective provisions in

8. *Provident Trandesmens Bank & Trust Company v. Patterson*, 390 U.S. 102, 109, 88 S.Ct. 733, 738 (1968).

9. Ibid, Fn. 3.

> the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U. S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). None of these factors were considered by the court below and the factual and legal situation is entirely different from that present in our decision in *Broussard v. Columbia Gulf Transmission Company*, 398 F.2d 885 (5th Cir. 1968), where dismissal was really just a form of transfer of the action to a more appropriate forum."

The requirement of F.R.C.P. 19(b) that there be a forum for the plaintiff is entirely overlooked in this case. Accordingly, the decision of the lower courts must be reversed.

3. Dismissal with prejudice is a result in conflict with other authority in the same Circuit, and that of other Federal Circuits.

The lower courts dismissed Temple's suit with prejudice on the authority of *Prestenback v. Employer's Insurance Company*, 47 F.R.D. 163 (E.D.La. 1969), although the dismissal entered in that case was without prejudice. The lower courts have thus created an inconsistency among the Circuits by failing to take into account certain interests recognized in F.R.C.P. Rule 19(b). The standard for review of a court's actions had bee set forth succinctly in *Pulitzer-Polster v. Pulitzer*, 764 F.2d 1305, 1312 (5th Cir. 1986), where a dismissal was properly entered without prejudice, because "relief in the state courts is available

to [the plaintiff]. . ."

The Fifth Circuit Court of Appeals ruled similarly in *Fouke v. Schenewerk*, 197 F.2d 234, 236 (5th Cir. 1952) where the District Court lacked jurisdiction when non-diverse indispensable parties' rights were affected. In holding that the District Court should have dismissed the action, the Court of Appeals held that "the courts of Texas are open to the plaintiffs and fully competent to acquire jurisdiction. . .".

In *Schutten v. Shell Oil Company*, 421 F.2d 869 (5th Cir. 1970) the Court of Appeals upheld the District Court's dismissal of a suit for non-joinder of an indispensable party. In analyzing the necessary considerations of Rule 19 the court held:

> "This. . . leads us to consider the fourth and final criteria of Rule 19: whether the appellant has an adequate remedy elsewhere. The answer to this question is that appellants will by no means be prejudiced themselves if forced to pursue their remedy in the courts of the State of Louisiana [which] offer a forum in which a complete adjudication of all interests can be obtained without fear of needless multiple litigation." (at page 875)

Dismissal without prejudice of a suit for failure to join an indispensable party is also the established rule in other Circuits. For example in *Fitzgerald v. Haynes*, 241 F.2d 417, 429 (3rd Cir. 1957) the Third Circuit Court of Appeals considered whether the District Court erred in dismissing a suit to prevent disposal of property in which absent parties may have had an interest. Joinder of these parties may have destroyed diversity jurisdiction. In affirming the District Court, the Court of Appeals held that "if the joining of these principal parties in interest should

reveal that the controversy is essentially a local one among Pennsylvanians, and thus not a diversity case, the result would be no more than the relegation of the suit *to the forum in which it belonged from the beginning*". Emphasis added.[10]

The lower courts, against well established authority, refused to consider the relevant criteria in enquiring whether to proceed, or dismiss under F.R.C.P. 19. According to the test recognized by the Supreme Court and various Circuit Courts, Dr. La Rocca and St. Charles General Hospital are not indispensable parties. Furthermore, a proper dismissal under Rule 19(b) must take into account a plaintiff's ability to proceed in another forum. This they did not, having expressly dismissed his suit with prejudice. Therefore, the judgment of the lower courts should be reversed.

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10. See also *Amarillo Oil Co. v. MAPCO, Inc.*, 99 F.R.D. 602 (1983). There, joinder of a defendant would have defeated diversity jurisdiction. In turning to the required analysis of Federal Rules of Civil Procedure 19(b) the Court held ". . .Plaintiffs *have an adequate remedy upon dismissal* (emphasis added): Texas State Court. This case presents state law issues and the Texas Courts haave many times in the past determined ownership interests in natural gas". At page 607.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BY: _____
ALAN R. SACKS
Counsel of Record
Attorney for Billy J. Temple

August 3, 1990

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3568
Summary Calendar

BILLY J. TEMPLE
Plaintiff-Appellant,

versus

SYNTHES CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-87-4581-"A" (2))

(March 9, 1990)

Before WILLIAMS, SMITH and DUHE, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal professions." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellant, Billy J. Temple, brought suit in federal district court against appellee, Synthes Corporation, Ltd., claiming the latter was the manufacturer of a defective spinal plate which had been implanted in appellant's lower spine. He also has brought a suit in state court against Dr. S. Henry LaRocca and the St. Charles General Hospital in New Orleans, Louisiana, for malpractice and for negligence in supplying and using this particular plate device.

The federal district court directed that appellant join Dr. LaRocca and the hospital in the federal suit under Fed. R. Civ. P. 19. The joining of those two parties would not oust the court of jurisdiction since appellant is a resident of Mississippi, Synthes is a corporation domiciled in Pennsylvania, and the doctor and the hospital are domiciled in Louisiana. Appellant refused to join the parties as directed by the court, and the court dismissed the case with prejudice. This is an appeal from that dismissal.

We find that there was no abuse of discretion in ordering the joinder of Dr. LaRocca and the hospital. The claims obviously overlap. In addition, the past history of the case shows that appellant postponed the federal suit on the ground that he was first going to pursue a malpractice claim under Louisiana administrative procedures. The doctor, hospital, and Synthes all participated in pretrial discovery matters. Then appellant determined to sue separately in state court asserting that under the law plaintiff is not required to sue all joint tortfeasors.

The difficulty with appellant's theory, of course, is that he is suing all alleged joint tortfeasors but he is suing them in separate courts where there will be separate trials. This means that he is undertaking to obtain two separate trials of the same basic issues which can obviously serve as a self-insurance scheme. If one case is lost, the other may

still prevail on the same issues.

It is obvious that Fed. R. Civ. P. 19 is intended to eliminate a multiplicity of lawsuits. Insofar as there are overlapping issues between the federal suit and the state suit, and appellant does not deny that there are, it is obviously prejudicial to the defendants to have the separate litigations being carried on. Thus, it may well be that Synthes' defense could be that its plate is not defective but that the hospital and the doctor were liable for neglignece. The defense of the doctor and hospital and their suit might well be that they did nothing wrong but that the plate was defective. The most obvious example of overlap is the claim that the hospital is liable for supplying this particular defective spinal plate.

The district court aptly cited the case of Prestenback v. Employers' Ins. Co., 47 F.R.D. 163, 167 (E.D.La. 1969). In that case plaintiff had filed suits in both federal and state court. The court said, "The filing of two separate suits is not only more expensive for the plaintiff but the public must bear the burden of double expenses for two suits. . . . [As such] the public interest clearly militates against repeated lawsuits on the same subject matter."

The standard for review of a dismissal under Rule 19 is "abuse of discretion". Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1308 (5th Cir. 1986). Under the circumstances of this case we can find no abuse of discretion in the action of the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3568

FILED
APR 11 1990

BILLY J. TEMPLE
Plaintiff-Appellant,

versus

SYNTHES CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(April 11, 1990)

Before WILLIAMS, SMITH and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

J. S. Williams
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
April 24, 1990

GILBERT F. GANUCHEAU
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Mrs. Loretta G. Whyte, Clerk
U. S. District Court
Room C-152
500 Camp St.,
NOLA 70130

No. 89-3568 - TEMPLE -vs- SYNTHES CORP.,

XX Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

☐ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

XX Copy of the Court's opinion.

XX Original record on appeal or review. 1 Volumes.

☐ Other original papers forwarded with record. _____Envelope_____Box.

XX Bill of Costs approved by this Court.XX Copy enclosed to counsel.

cc: (Letter Only)

Hon. Charles Schwartz
ALL COUNSEL OF RECORD

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By:/s/ Sarah L. Holmes
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed Mar 13 1990

BILL OF COSTS

NOTE: The Bill of Costs is due for filing in this office *within 14 days from the date of the opinion*, in accordance with Rule 39 F.R.A.P. If a biss of costs is not timely filed in this office, processing can be accomplished only by the filing of a formal motion for leave to file same out of time.

BILLY J. TEMPLE v. SYNTHES CORPORATION

No. 89-3568

The Clerk is requested to tax the following costs against:
Appellee, Billy J. Temple

COSTS TAXABLE UNDER FRAP & LOCAL RULES 39	REQUESTED			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost
Docket fee ($100.00)				
Appendix ro Record Excerpts				
Appellant's Brief				
Appellee's Brief	11	308	.095	29.26
Appellant's Reply Brief				
Other: Binding of Appellee Brief				21.00
			Total $ 50.26	

COSTS TAXABLE UNDER FRAP & LOCAL RULES 39	ALLOWED (If different from amount requested)			
	No. of Documents	Pages Per Docs	Cost per Page*	Total Cost
Docket fee ($100.00)				
Appendix ro Record Excerpts				
Appellant's Brief				
Appellee's Brief				29.26
Appellant's Reply Brief				
Other: Binding of Appellee Brief	11		1.50	16.50
Costs are taxed in the amount of $ 45.76				

Costs are hereby taxed in the amount of $ 45.76 this 24th day of April, 1990.
Gilbert F. Ganucheau, Clerk

State of
County of Orleans By Mary L. (illegible)

I, Andrew L. Plauche, Jr., do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to oppositing counsel, with postage fully prepaid thereon. This 12th day of March, 1990.

/s/ Andrew L. Plauche, Jr.
(Signature)

Attorney for Synthes U.S.A.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
AUG 16 '89

BILLY J. TEMPLE	CIVIL ACTION
VERSUS	NO. 87-4581
SYNTHES CORPORATION	SECTION "A"

JUDGMENT

Counsel for plaintiff, having failed to comply with the Court's Order dated and filed herein on: July 24, 1989, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendant Synthes Corporation (Synthes Ltd. U.S.A.) and against plaintiff Billy J. Temple, dismissing plaintiff's complaint with prejudice, plaintiff to bear all costs.

New Orleans, Louisiana, this 15th day of August, 1989.

/s/ Loretta G. White
LORETTA G. WHITE

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY AUG 16, 1989

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
JUL 24 '89

BILLY J. TEMPLE	CIVIL ACTION
VERSUS	NO. 87-4581
SYNTHES CORPORATION	SECTION "A" (2)

ORDER AND REASONS

A hearing was held on defendant's Motion to Dismiss for Failure to Join Parties Needed for Just Adjudication, on Wednesday, May 10, 1989. Following oral argument, the matter was taken under advisement. For the following reasons, it is hereby ORDERED that plaintiff be given twenty (20) days within which to join as parties Dr. S. Henry LaRocca and St. Charles General Hospital. If plaintiff fails to join said parties within the time prescribed, it is ORDERED that plaintiff's suit be DISMISSED.

This matter arises as a result of an alleged improper operable[sic] procedure pursuant to which a "plate and screw device" was implanted in plaintiff's lower spine. Due to injuries allegedly sustained from this surgical implant, plaintiff has sued Synthes Corporation ("Synthes"), the manufacturer of the "plate and screw device," in federal court; and has sued Dr. S. Henry LaRocca, the doctor who

DATE OF ENTRY JUL 24, 1989

performed the implant surgery, and St. Charles General Hospital, the hospital where the surgery was performed, in state court.

Rule 19 of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest . . . .

In this case, the joinder of the pertinent parties will not deprive this Court of jurisdiction.[1] Further, the instant case is not one where a claim against the named defendant can proceed without effect upon the absent parties. This is evidenced by the fact that all three parties, i.e., Synthes, Dr. LaRocca and St. Charles General Hospital, have been included in the federal court status conferences. Additionally, all three parties have been involved in the discovery which has taken place in connection with the federal proceeding.

Finally, and perhaps most importantly, the absent parties should be joined in this federal proceeding in the interest of judicial economy. As stated by the United States Supreme Court in *Provident Tradesmens Bank and Trust*

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1. Diversity is not destroyed because plaintiff is domiciled in Mississippi and the parties ordered to be joined are domiciled in Louisiana.

Co. v. Patterson, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed. 936 (1968), the courts and the public, as well as the litigants, have an interest in "complete, consistent, and efficient settlement of controversies." *Patterson*, 88 S.Ct. at 739. In *Prestenback v. Employers' Insurance Co.*, 47 F.R.D. 163 (1969), Judge Heebe elaborated on this point, stating: "The filing of two separate suits is not only more expensive for the plaintiff but the public must bear the burden of double expenses for two suits. . . .[As such,] the public interest clearly militates against repeated lawsuits on the same subject matter." *Prestenback*, 47 F.R.D. at 167.

Accordingly, IT IS ORDERED that plaintiff be given twenty (20) days within which to join Dr. S. Henry LaRocca and St. Charles General Hospital as parties in this action pursuant to the provisions of Federal Rule of Civil Procedure 19. If plaintiff fails to join said parties within the time prescribed, the Clerk of Court is hereby directed to enter final judgment, dismissing plaintiff's action with prejudice.

New Orleans, Louisiana, this 24th day of July, 1989.

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

(2)

No. 90-295

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BILLY J. TEMPLE,
Petitioner,

v.

SYNTHES, LTD. (U.S.A.),
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petition, which consists of nothing more than a complaint about a discretionary joinder ruling under Federal Rule of Civil Procedure 19(a) and a discretionary dismissal with prejudice ruling for failure to comply with an order of the Trial Court under Federal Rule of Civil Procedure 41(b), presents any "special and important reasons" in accordance with Rule 17 of the Supreme Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petitioner, Billy J. Temple, a resident of the State of Mississippi, instituted claims for bodily injury damages in September of 1987 by filing a Louisiana state court proceeding against Louisiana residents, Dr. S. Henry LaRocca and St. Charles General Hospital, and by filing a United States District Court, Eastern District of Louisiana proceeding against Synthes, Ltd. (U.S.A.), a Pennsylvania resident. The same damages were claimed in the state court proceeding and in the federal court proceeding.

At status conferences that took place in the federal court proceeding between late 1987 and early 1989, the petitioner, through his attorney, repeatedly told the District Judge that he intended to join Dr. LaRocca and St. Charles General Hospital as defendants in federal court as soon as the state court administrative proceedings were concluded. For over 15 months, the District Judge and all parties including the petitioner, Temple, the respondent, Synthes, and the state court parties, Dr. LaRocca and St. Charles General Hospital, monitored the state administrative proceedings and participated in joint discovery.

After the state administrative proceedings were concluded, the petitioner suddenly refused to name Dr. LaRocca and St. Charles General Hospital as federal court defendants. The attorney for petitioner then announced to the District Judge that he wanted to pursue the same damages against the defendants in two separate courts at the same time (despite the fact that adding Dr. LaRocca and St. Charles General was feasible and that diversity jurisdiction would not be destroyed by their joinder).

The District Judge thereafter ruled on a motion by Synthes that Dr. LaRocca and St. Charles General Hospital were indeed parties needed for a just adjudication under Federal Rule of Civil Procedure 19. Because joinder was feasible and diversity would not be destroyed, the District Judge ordered the petitioner to join Dr. LaRocca and St. Charles General Hospital as defendants within twenty days or have his case dismissed. The petitioner failed to comply with the order of the District Judge and the District Judge thereafter dismissed the federal court complaint with prejudice for failure to comply with an order of court as permitted by Rule 41(b) of the Federal Rules of Civil Procedure.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and the judgment of the District Court was affirmed in a *per curiam* opinion. Thereafter petitioner sought a rehearing which was denied by the Fifth Circuit, again in a *per curiam* ruling. Finally, petitioner filed a motion to recall mandate and to extend the time for seeking a rehearing *en banc*, and both motions were denied by Judge Williams of the Fifth Circuit.

Petitioner now seeks a writ of certiorari from the Supreme Court, and Synthes opposes the petition on the grounds that the rulings complained of are discretionary rulings which were properly made under the Federal Rules of Civil Procedure. As such, the Petition for Writ of Certiorari should be denied because the petitioner does not purport to present any of the "special and important reasons" which govern review by the United States Supreme Court on writs of certiorari.

ARGUMENT

Throughout the proceedings below, and throughout his brief submitted with his petition to the Supreme Court, the petitioner has failed to recognize that the order of dismissal by the district court was properly made, because under Rule 19 the District Judge properly found that Dr. LaRocca and St. Charles General Hospital were parties needed for a just adjudication of the claim of the petitioner, *and* because it was feasible to join Dr. LaRocca and St. Charles General Hospital. The Rule 19 decision of the District Judge, therefore, found that there were "parties needed for a just adjudication" and that the parties could be joined so the District Judge entered the following order:

> "Accordingly, IT IS ORDERED that plaintiff be given twenty (20) days within which to join Dr. S. Henry LaRocca and St. Charles General Hospital as parties in this action pursuant to the provisions of Federal Rule of Civil Procedure 19. If plaintiffs fail to join said parties within the time prescribed, the Clerk of Court is hereby directed to enter final

judgment, dismissing plaintiffs action with prejudice." (*See* Petition for Writ of Certiorari, Appendix E).

When the petitioner thereafter *failed to comply with the above order*, the District Judge executed the following judgment:

> *"Counsel for plaintiff, having failed to comply with the Court's Order dated and filed herein on: July 24, 1989, accordingly;*
>
> "IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of defendant Synthes Corporation (Synthes Ltd. (U.S.A.) and against plaintiff Billy J. Temple, dismissing plaintiff's complaint with prejudice, plaintiff to bear all costs. (*See* Petition for Writ of Certiorari Appendix D (emphasis added).

The finding that Dr. LaRocca and St. Charles General Hospital were parties needed for a just adjudication under Rule 19 is well supported by the principles of *Provident Tradesman Bank and Trust Co. v. Patterson*, 88 S. Ct. 733, 390 U.S. 102, 19 L. Ed. 2d 936 (1968) in which this Court said:

> "First, the plaintiff has an interest in having a forum . . . second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another . . . third there is an interest of an outsider whom it would have been desireable to join . . . fourth, there remains the interest of the Courts and the public in complete, consistent, and efficient settlement of controversies. (88 S.Ct. at 738-739, 390 U.S. at 109-111, 19 L. Ed. 2d at 945-946)."

The rationale of the *Provident Tradesman Bank and Trust Co.* case has been followed in many cases since 1968. (*See e.g. Pultizer—Polster v. Pultizer*, 784 F. 2d 1035 (5th Cir. 1986); *Broussard v. Columbia Gulf Transmission Co.*, 398 F. 2d 885 (5th Cir. 1988); *Morrison v. New Orleans Public Service, Inc.*, 415 F. 2d 419

(5th Cir. 1969); and *Schutten v. Shell Oil Co.*, 421 F. 2d 869 (5th Cir. 1970).

Inasmuch as the decision under Rule 19 is a discretionary decision by the Trial Judge which is amply supported by the facts of this case and the law as stated by *Provident Tradesman Bank and Trust Co. v. Patterson*, *supra*, and its progeny, the decision under Rule 19 presents no "special and important reasons" for review by this Court.

Moreover, because the actual dismissal with prejudice came after the plaintiff violated the order of the Trial Judge, the plaintiff has no cause to complain because Rule 41(b) of the Federal Rules of Civil Procedure allows such dismissals. Rule 41(b) provides:

> "Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or *any order of Court*, a defendant may move for a dismissal of an action or of any claim against him . . . Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of prosecution, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." (Emphasis added).

As stated by the Fifth Circuit, the dismissal under Rule 41(b) by the Trial Judge was proper. In *English v. Seaboard Coastline R. Co.*, 465 F. 2d 43 (5th Cir. 1972) the Fifth Circuit explained:

> "When the Court decides under Rule 19(a) that a person should be joined, the Court should direct the plaintiff to amend his complaint to add the person. *Failure to comply with such an order may result in dismissal of plaintiff's action under Rule 41 (b) F.R.C.P. for failure of a party to comply with an order of Court.*" 465 F.2d at 47-48) (emphasis added).

Because the complaint of petitioner to this Court concerns a discretionary dismissal "with prejudice" which is permitted under Rule 41(b), the petitioner has again failed to set forth any "special and important reasons" for review by this Court. The ruling below that is being complained of in this case is a discretionary ruling for a dismissal with prejudice because of the violation of an order of Court under Rule 41(b). In *Goforth v. Owens*, 766 F. 2d 1533 (11th Cir. 1985) the Court said:

> "*A district court is authorized* on defendant's motion, *to dismiss* an action *for failure* to prosecute or *to obey a Court order or federal rule.* F.R. Civ. P. 41(b). The Court's power to dismiss as an inherent aspect of its authority to enforce its orders and insure prompt disposition of lawsuits." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, 1388-89, 8 L.Ed. 2d 734 (1962); *Jones v. Graham*, 709 F. 2d 1457, 1458 (11th Cir. 1983). (766 F. 2d at 1535) (emphasis added).

Because the circumstances leading up to the dismissal of this case were caused and created solely by the actions of plaintiff himself, and because the District Judge was within his discretion in making a Rule 19 decision finding Dr. LaRocca and St Charles General Hospital as parties who could feasibly be joined, and because the plaintiff thereafter decided to ignore the order of the Trial Judge, the dismissal under Rule 41(b) was itself proper. Inasmuch as all of the decisions below are authorized by the Federal Rules of Civil Procedures, the Petition for a Writ of Certiorari in this case should be denied.

CONCLUSION

This is a case where petitioner represented, for over 18 months, that he would add more parties as defendants who should be parties and whose joinder would not destroy diversity. After 18 months, petitioner changed his mind and defied all suggestions of the Trial Court to add the parties. On a timely filed motion by respondent, the Trial Judge thereafter held that the additional parties were indeed parties needed for a just adjudication under Rule 19(a) of the Federal Rules of Civil Procedures and that it was feasible to join them under Rule 19(a). Appellant was ordered by the Trial Judge to add them as defendants within twenty days or have the case dismissed with prejudice. Petitioner continued his refusal to comply with the order of the Trial Judge. The Trial Judge thereafter dismissed the suit with prejudice for violation of the order of Court under Rule 41(b) of the Federal Rules of Civil Procedure. The decision of the Trial Judge has been upheld by a three Judge panel of the Fifth Circuit which affirmed the rulings below in an original opinion, an opinion on rehearing, and in an order denying a motion to recall mandate.

The petitioner has sought a writ of certiorari, but under Rule 17 of this Court, there are no "special important reasons" for review by this Court. Respondent, Synthes, Ltd. (U.S.A.), respectfully submits that the decision under Rule 19(a) was proper (*Provident Tradesman Bank and Trust Co. v. Patterson*, 88 S. Ct. 733, 390 U.S. 102, 19 L. Ed. 2d 936 (1968); *Prestenback v. Employer's Insurance Co.*, 47 F.R.D. 163 (E.D. La. 1969); *Pultizer-Polster v. Pultizer*, 784 F. 2d 1935 (5th Cir. 1986). Moreover, Synthes, Ltd. (U.S.A.) further respectfully submits that the dismissal under Rule 41(b) was also proper. (*English v. Seaboard Coastline R. Co.*, 465 F. 2d 43 (5th Cir. 1972); *Goforth v. Owens*, 766 F. 2d 1533 (11th Cir. 1985).

Because of the discretionary and appropriate nature of the ruling below, Synthes, Ltd. (U.S.A.) respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

BILLY J. TEMPLE *v.* SYNTHES CORPORATION, LTD.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90–295. Decided November 5, 1990

PER CURIAM.

Petitioner Temple, a Mississippi resident, underwent surgery in October 1986 in which a "plate and screw device" was implanted in his lower spine. The device was manufactured by respondent Synthes, Ltd. (U. S. A.) (Synthes), a Pennsylvania corporation. Dr. S. Henry LaRocca performed the surgery at St. Charles General Hospital in New Orleans, Louisiana. Following surgery, the device's screws broke off inside Temple's back.

Temple filed suit against Synthes in the United States District Court for the Eastern District of Louisiana. The suit, which rested on diversity jurisdiction, alleged defective design and manufacture of the device. At the same time, Temple filed a state administrative proceeding against Dr. LaRocca and the hospital for malpractice and negligence. At the conclusion of the administrative proceeding, Temple filed suit against the doctor and the hospital in Louisiana state court.

Synthes did not attempt to bring the doctor and the hospital into the federal action by means of a third-party complaint, as provided in Federal Rule of Civil Procedure 14(a). Instead, Synthes filed a motion to dismiss Temple's federal suit for failure to join necessary parties pursuant to Federal Rule of Civil Procedure 19. Following a hearing, the District Court ordered Temple to join the doctor and the hospital as defendants within twenty days or risk dismissal of the lawsuit. According to the court, the most significant reason for requiring joinder was the interest of judicial economy. App. C to Pet. for Cert. A–12. The court relied on this Court's

decision in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102 (1968), wherein we recognized that one focus of Rule 19 is "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Id.*, at 111. When Temple failed to join the doctor and the hospital, the court dismissed the suit with prejudice.

Temple appealed, and the United States Court of Appeals for the Fifth Circuit affirmed. 898 F. 2d 152 (1990) (judgment order). The court deemed it "obviously prejudicial to the defendants to have the separate litigations being carried on," because Synthes' defense might be that the plate was not defective but that the doctor and the hospital were negligent, while the doctor and hospital, on the other hand, might claim that they were not negligent but that the plate was defective. App. A to Pet. for Cert. A–3. The Court of Appeals found that the claims overlapped and that the District Court therefore had not abused its discretion in ordering joinder under Rule 19. A petition for rehearing was denied.

In his petition for certiorari to this Court, Temple contends that it was error to label joint tortfeasors as indispensable parties under Rule 19(b) and to dismiss the lawsuit with prejudice for failure to join those parties. We agree. Synthes does not deny that it, the doctor, and the hospital are potential joint tortfeasors. It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. See *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329–330 (1955); *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 132 (1912). See also *Nottingham* v. *General American Communications Corp.*, 811 F. 2d 873, 880 (CA5) *(per curiam)*, cert. denied, 484 U. S. 854 (1987). Nothing in the 1966 revision of Rule 19 changed that principle. See *Provident Bank*, *supra*, at 116–117, n. 12. The Advisory Committee Notes to Rule 19(a) explicitly state that "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability." Advisory Committee's

Notes on Fed. Rule Civ. Proc. 19, 28 U. S. C. App., p. 594, at 595. There is nothing in Louisiana tort law to the contrary. See *Mullins* v. *Skains*, 252 La. 1009, 1014, 215 So. 2d 643, 645 (1968); La. Civ. Code Ann., Arts. 1794, 1795 (West 1987).

The opinion in *Provident Bank*, *supra*, does speak of the public interest in limiting multiple litigation, but that case is not controlling here. There, the estate of a tort victim brought a declaratory judgment action against an insurance company. We assumed that the policyholder was a person "who, under § (a), should be joined if 'feasible.'" 390 U. S., at 108, and went on to discuss the appropriate analysis under Rule 19(b), because the policyholder could not be joined without destroying diversity. *Id.*, at 109–116. After examining the factors set forth in Rule 19(b), we determined that the action could proceed without the policyholder; he therefore was not an indispensable party whose absence required dismissal of the suit. *Id.*, at 116, 119.

Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied. As potential joint tortfeasors with Synthes, Dr. LaRossa and the hospital were merely permissive parties. The Court of Appeals erred by failing to hold that the District Court abused its discretion in ordering them joined as defendants and in dismissing the action when Temple failed to comply with the court's order. For these reasons, we grant the petition for certiorari, reverse the judgment of the Court of Appeals for the Fifth Circuit, and remand for further proceedings consistent with this opinion.

It is so ordered.